83-201

NO.

in the Supreme Court of the United States

MILTON WEISS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BLACK & FURCI P.A.
1300 Miami Center
100 Chopin Plaza
Miami, Florida 33131
Roy E. Black
Attorney for Petitioner

QUESTIONS PRESENTED

ISSUE I

WHETHER THE GOVERNMENT'S CONTINUED REFUSAL TO DISCLOSE INFORMATION LOCATED SOLELY IN THE GOVERNMENT'S FILES, WHICH WOULD HAVE PROVEN THAT THE GOVERNMENT'S STAR WITNESS LIED WHEN HE TESTIFIED THAT HE WAS AN UNDER-COVER AGENT FOR UNITED STATES GOVERNMENT AGENCIES FOR TWENTY-SIX YEARS WHEN, IN FACT, HE BECAME A GOVERNMENT INFORMANT AFTER A COCAINE ARREST, DENIED THE PETITIONER HIS DUE PROCESS RIGHT TO A FAIR TRIAL WHERE THE MATERIALS WERE SPECIFICALLY REQUESTED, NOT OTHERWISE AVAILABLE TO HIM, AND PROPERLY DISCOVERABLE UNDER *BRADY v. MARYLAND.*

ISSUE II

WHETHER THE PRESENTATION OF PERJURED TESTIMONY BY THE GOVERNMENT IN THEIR CASE IN CHIEF OF THE GOVERNMENT'S STAR WITNESS TESTIFYING TO TOTALLY FICTITIOUS BACKGROUND OF TWENTY-SIX YEARS OF LAW ENFORCEMENT AND UNDER-COVER WORK VIOLATED PETITIONER'S DUE PROCESS RIGHT TO A FAIR TRIAL WHERE THE TESTIMONY WAS PREJUDICIAL AND MATERIAL TO HIS CONVICTION, AND KNOWN TO THE PROSECUTING AUTHORITIES TO BE FALSE AND MISLEADING.

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II. The use of perjured testimony by the prosecution during the petitioner's trial violated the petitioner's due process rights because the testimony, which related to the background, experience and motivation of the government's chief and only witness against the petitioner, bolstered the credibility of that witness in the eyes of the jury, thus prejudicing the petitioner . 17

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NO.

in the Supreme Court of the United States

OCTOBER TERM 1983

MILTON WEISS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, MILTON WEISS, by his undersigned counsel, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on May 4, 1983, rehearing denied June 7, 1983.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at Appendix A hereto and at ____ F.2d ____ (3d Cir. 1983). The order denying rehearing was filed on June 7, 1983.

JURISDICTION

The judgment of the United States Court of Appeals affirming the judgment of the United States District Court was entered on May 4, 1983. The Petition for Rehearing was denied on June 7, 1983.

This petition is filed pursuant to Rule 20, Rules of the Supreme Court, as amended. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code §1254 (1).

Upon the motion of the Petitioner, the issuance of the mandate was stayed by the court of appeals to and including July 14, 1983.

This Petition is timely.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> **No person shall be *** deprived of life, liberty, or property, without due process of law*****

STATEMENT OF THE CASE

On June 18, 1982, the Petitioner, MILTON WEISS, was charged along with two co-defendants in a six-count Information charging conspiracy and distribution of a controlled substance. In Count I, MILTON WEISS was found guilty of conspiracy together with the other two defendants. In Count II, all three defendants were charged with distribution of cocaine on July 27, 1981. MILTON WEISS was found not guilty. In Count III, all three defendants were charged with distribution on cocaine on August 14, 1981. MILTON WEISS was found not guilty. In Count IV, all three defendants were charged with distribution of cocaine on August 31, 1981. Again, MILTON WEISS was found not guilty. In Count V, all the defendants were charged with distribution of cocaine on September 15, 1981. MILTON WEISS was found guilty. The last count of the Information charged only the two co-defendants, STEPHEN J. SESSA and ERICA SMITH, with distribution of dilaudid; MILTON WEISS was not joined in this count.

The case was tried in the United States District Court for the Virgin Islands in a trial by jury before the Hon. DAVID V. O'BRIEN. During the course of the trial no evidence, direct or circumstantial, was given which linked MILTON WEISS to the July 27, 1981, August 14, 1981, or August 31, 1981 deliveries of cocaine. As to the September 15, 1981 delivery, there was evidence showing that MILTON WEISS visited the establishment where co-defendant STEPHEN SESSA worked on that date. This establishment was a retail fruit and vegetable store where MILTON WEISS regularly shopped, and where he had a running bill of several hundred dollars per month in supplies for his restaurant. Approximately 1,000 customers frequented the store on a daily basis.

The only evidence linking MILTON WEISS to the crimes was testimony given by LUCIEN FELDON, the Government's star witness, who was a drug user and habitual liar, posing as a career police officer. The evidence given by LUCIEN FELDON was an alleged April 30, 1982 conversation between himself and MILTON WEISS. According to FELDON, he had a conversation on that date with MILTON WEISS, and they discussed the sale of cocaine from MILTON WEISS to LUCIEN FELDON. FELDON testified that he did not buy any cocaine from MILTON WEISS at that time because he didn't have any money.

The Government also introduced into evidence certain tape recordings of telephone conversations between LUCIEN FELDON and co-defendant STEPHEN SESSA. MILTON WEISS' name was not mentioned on these tape recordings. LUCIEN FELDON claimed to have spoken with MILTON WEISS on the telephone on May 2, 1982. This conversation was not recorded.

In the Government's opening statement, LUCIEN FELDON was described as:

> *". . . a special agent who was during the course of these transactions an undercover agent for the Department of Law, Narcotics Strike Force; Mr. Lucien Feldon, who has had over twenty-five years' experience as a police officer and undercover agent in various intelligence activities."*

Prior to the trial, and continuing throughout the trial, counsel for the Defendant demanded information relating to LUCIEN FELDON's claims of twenty-five

years of police experience. Counsel's demands were refused by both the Government and the trial court. Specifically, MILTON WEISS requested:

> *"(e) Any and all personnel files for LUCIEN FELDON; the existence and identity of all Federal, State, and local files for him and the identity or existence of all official internal affairs, internal investigation, or public integrity investigation files relating to or connected with him;*
>
> *(g) Any and all other records, documents, and information which arguably could be helpful or useful to the defense in impeaching this witness or otherwise detracting from the probative value of his testimony, or which, arguably, could lead to such records or information;*
>
> *(h) Any and all records, documents, and information relating to LUCIEN FELDON's conviction for larceny, which apparently occurred in 1953 in New York, and any information relating to his arrest for conspiracy to distribute cocaine which apparently was dismissed in 1974. Provide all information which shows the cause of the dismissal of the 1974 conspiracy arrest, particularly including any plea bargain agreements for dismissal based on cooperation with the Government;*

(i) State the position held by LUCIEN FELDON as an 'intelligence operative for defense intelligence agencies'. The Government has advised that he held this position from 1953 until 1973. State what type of work he did for the Government, the amount of his compensation, whether that work occurred within or without the United States, and any other information which is relevant to his employment. Particularly state whether FELDON was a special agent working for the Government or was working as some kind of undercover informer."

(Defendant's Motion for Production of Favorable Evidence).

This information was denied to the Petitioner by order of the trial court (APPENDIX A).

LUCIEN FELDON testified that he had been an undercover agent for approximately twenty-six years. During the remainder of his testimony, his background was developed in such a way so as to appear that he had been involved in various Governmental intelligence and police agencies for all of that time.

During his short and volatile career with the Narcotics Strike Force in the Virgin Islands, LUCIEN FELDON had testified in several cases. In order to highlight discrepancies in his testimony, undersigned counsel attached partial transcripts from three of the previous trials to the Defendant's Motion for Judgment of Acquittal; Motion for New Trial and Arrest of Judgment with Incorporated Memorandum of Law.

In *United States v. Luis Francisco de la Rionda, Case No. Cr-82-94,* LUCIEN FELDON testified:

> *"Starting roughly, late '51 and early 1952, I was an intelligence operative for various government agencies including the Defense Intelligence Administration Agency, the Office of Strategic Services, the State Department Intelligence, National Security Intelligence Agency, and some highly sensitive areas, involved with deep cover gathering, collating, and some case analysis."*

In *United States v. Harry Hunter, Case No. Cr-82-92,* LUCIEN FELDON testified as to how he got involved with the Drug Enforcement Administration. There, he claimed that he was an undercover intelligence operator for: the Office of Strategic Services, Drug Administration, State Department Intelligence, and Defense Intelligence throughout the world from late 1951 to the present; that he submitted a resignation to the Defense Department in the winter of 1973, but his resignation was not accepted and he was put on the discretion of Government status; that he held the rank of Major in the United States Army as a non-combatant, and that he volunteered his services to the D.E.A.

Under cross-examination in the instant case, FELDON retreated somewhat from his initial stories and told a new tale of how he became involved with the Drug Enforcement Administration. Abandoning the story he originally told in *United States v. Harry Hunter,* FELDON decided to cloak the circumstances of his involvement in a veil of mystery, claiming that he had simply made commitments, the nature of which could not be revealed.

This mysterious commitment occurred coincidentally just as the time when LUCIEN FELDON was arrested in 1974 for delivery of cocaine. The circumstances surrounding that arrest were a matter of great contention at trial.

At the Petitioner's trial, LUCIEN FELDON testified that in the fall and winter of 1973, he was on sick leave from the Government agency he was working with. He was contacted by an agent from the Drug Enforcement Administration with whom he had worked on a national security situation. A representative from the Defense Intelligence Administration came and told FELDON that they needed him for a special situation. He was, according to his testimony, engaged to infiltrate a radical terrorist group in New Jersey:

> *"The situation being that Arch Tinunoll—let's call him Paul for facility—was working with a militant radical group for whom he not only worked, but also was selling drugs to maintain a cash flow for this group, that he was willing to bring in an agent or an operative and introduce him or try to introduce him into this cadre of radical groups . . ."*

LUCIEN FELDON testified that in order to get into this group, he and a fellow "operative" had to go to Puerto Rico and pick up two ounces of cocaine. The fellow operative made the buy, and later, at a meeting at LUCIEN FELDON's house, the cocaine was sold to Agent WILLIAM SIMPSON of the D.E.A. Some months later, FELDON testified that he got a call from the Defense Intelligence Administration telling him that the fellow operative hired by FELDON was working

out fine, and asking whether or not they could get more cocaine from the FALN people in Puerto Rico. FELDON and his "fellow operative" agreed to do so.

However, FELDON claims that later on that day, he found out that the DIA had actually been blocked out of whatever was going on. FELDON testified that when he found this out, he went to the airport to meet his "operative":

> *"I went to the airport to greet Jerry. I knew what plane he was coming back on. I asked him if he had gotten the coke and he said 'Yes, I did'. I said okay, we're going to drive, and, as we do, I want you to pour it out. Just pour it out as we go along. And he did, screaming all the time. But I said 'Look, I think there is something wrong here' and, sure enough, as soon as we got back to my apartment, we both got arrested by the D.E.A."*

Later in the trial, much to FELDON's obvious surprise, the Petitioner called to the witness stand Special Agent WILLIAM SIMPSON of the Department of Justice, Drug Enforcement Administration. Special Agent SIMPSON was the acting supervisor for Task Force Group Seven, and was the officer who arrested LUCIEN FELDON in 1974. He testified that LUCIEN FELDON only became a cooperating individual after his arrest. When questioned concerning LUCIEN FELDON's version of the arrest, Special Agent SIMPSON testified as follows:

"Q. Alright, sir. And what was he arrested for?

A. He sold some cocaine to me.

Q. Alright. Prior to Mr. Feldon selling you the cocaine, had you ever met him?

A. No, sir.

* * *

"Q. Did he ever tell you that he wanted to—or excuse me, did you approach Mr. Feldon along with administrators from the State Department and tell him that you wanted him to assist you in infiltrating a terrorist group in New Jersey and, as part of his activities as an undercover agent, was to sell you cocaine to enhance his credibility with that terrorist group? Did that ever happen?

A. No, sir.

Q. To the best of your knowledge, when Mr. Feldon sold you cocaine, was he employed by the State Department or the Defense Intelligence Agency?

A. No, sir.

Q. What was his employment?

A. He was a photographer.

Q. At the time of his arrest did he tell you why he was selling cocaine?

A. Yes.

Q. What was his reason?

A. Well, he stated back then that he was writing a book and in order for him to find out how the underworld organized crime operated, he had to do that."

Later, on re-direct, Agent SIMPSON testified:

"Q. Could you please tell me why there was no conviction of Mr. Feldon?

A. Yes. Mr. Feldon cooperated with the Government and did an outstanding job so all of the charges were dismissed."

On cross-examination, the Government tried to show that Agent SIMPSON's testimony was influenced by financial considerations, even enquiring as to whether Agent SIMPSON expected Petitioner's counsel to reimburse him for the dinner he'd had the night before. They further tried to undermine his testimony by suggesting that LUCIEN FELDON was so deeply undercover that even Agent SIMPSON didn't know about it.

Throughout the entire trial, the only witness who furnished direct evidence against the Petitioner was LUCIEN FELDON. STEPHEN SESSA, the Petitioner's co-defendant, testified that he was supplied with cocaine by somebody named MIKE MORGAN, and that MILTON WEISS was not his supplier.

REASONS FOR GRANTING THE WRIT

Upon request, the Government must turn over to the defense any information which may be favorable. *Brady v. Maryland, 373 U.S. 83 (1963); Moore v. Illinois, 408 U.S. 786 (1972); Giglio v. United States, 405 U.S. 150 (1971).* Further, this Court has held that when a prosecutor procures a criminal conviction through the use of perjured testimony, known to be perjured and knowingly used to procure the conviction, due process of law is violated.[1] This case deals with Governmental disregard of both these doctrines: in it, the Government secreted information pertaining to its chief and only witness against Petitioner, and aided and abetted that witness in perjuring himself before the District Court.

1. Constitutional rights to due process and a fair trial presumptively entitle an accused person to all favorable information in the possession of the Government. The Government then has an affirmative duty to turn this evidence over to the defense if due process is to be afforded. The interest of the Government is to ensure the emergence of truth at trial.

> *No respectable interest of the state is served by concealment of information which is material, generously conceived, including all possible defenses."*
>
> Giles v. Maryland, *386 U.S. 66, 98 (1966) (Fortas, J. concurring).*

[1] *Mooney v. Holohan, 294 U.S. 103 (1935).*

As reiterated in *Moore v. Illinois, 408 U.S. 786, 794-795,* the standards by which the Government's conduct is to be measured for possible due process violations are (a) whether the evidence was suppressed by the prosecution after a defense request; (b) its favorable character for the defense; and (c) its materiality. Petitioner's repeated pre-trial, in-trial, and post-trial demands for information relating to LUCIEN FELDON's background and position with the Drug Enforcement Administration and other Government agencies are a matter of record. So, too, are the Government's and the trial court's refusals to grant MILTON WEISS access to that information.

The information requested by, and denied to, the Petitioner was possibly the only evidence that he could have presented to refute FELDON's testimony. In the trial court's memorandum opinion denying MILTON WEISS' Motion for New Trial, Judge O'Brien commented on the importance of LUCIEN FELDON's testimony in the Petitioner's case, saying:

> *". . . for the jury to decide whether Feldon was believable as a witness in this case, [was] a decision on which, truly, the defendant's life and liberty depended."*

During the trial of MILTON WEISS, the jury was given a choice of believing LUCIEN FELDON, a man they thought to be a Government agent with a twenty-six year law enforcement career and whose story was supported by the director of the Narcotics Strike Force, or AGENT SIMPSON, a D.E.A. agent produced by Petitioner and attacked by Government counsel as being ignorant of the facts and having a financial interest in the outcome of the case. No single piece of evidence

would have—or could have—been more favorable to the Petitioner than the evidence refused to him, which would have uncloaked LUCIEN FELDON as a fraud and a liar. The evidence denied to Petitioner would have enabled the jury to consider FELDON's lack of credibility. Absent this evidence, the jury was left to weigh the testimony of one defense witness against the power and integrity of the United States Attorney's office.

The materiality of the suppressed evidence is highlighted by the importance of the jury's belief in the testimony of LUCIEN FELDON in order for the Government to secure the conviction. The importance of this testimony was frequently commented upon by the District Court:

> *"Because the defendants in this case are charged with such serious matters, which could in certain instances bring as much as 75 to 90 years . . . because Mr. Feldon's testimony was largely the basis on which any convictions, if they were to be gained, would be gained."*

This materiality of LUCIEN FELDON's credibility is more sharply brought into focus when one considers the evidence brought against MILTON WEISS at trial. Without the testimony of LUCIEN FELDON, the Government simply had no case against MILTON WEISS. In *Wardius v. Oregon, 412 U.S. 470 (1973)*, this Court noted that:

"While the due process clause has little to say about the amount and type of discovery which the parties must be afforded, 'it' does speak to the balance of forces between the accused and the accuser."

The Government may not insist that trials be run as a search for the truth so far as defense witnesses are concerned, while maintaining "poker-game secrecy for its own witnesses". In keeping with this policy the Supreme Court has recognized the materiality of, and the prosecution's duty, to disclose evidence relating solely to the credibility of one of the Government's witnesses. *Giglio v. United States, 405 U.S. 150 (1971).*

The litany of lies told by LUCIEN FELDON during his testimony to bolster his credibility were both material and prejudicial to Petitioner. The Government's refusal to give the Petitioner the information needed to impeach LUCIEN FELDON violated this Court's ruling in *Brady v. Maryland, 373 U.S. 83 (1963)* and amounted to the "poker-game secrecy" condemned in *Wardius v. Oregon, 412 U.S 470 (1973)* and, as such, violated the due process rights of the Petitioner.

2. The premiere requirement for the successful operation of the adversary system is the fact-finding device, and each party's ability to present evidence favorable to their position while rebutting evidence given by their opponent. The prosecutor's duty to disclose to the defense any false or substantially misleading testimony given by its witnesses is based on the view that:

"The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. Rather, his function is to vindicate the right of the people as expressed in the laws, and give those accused of crime a fair trial."

Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

In 1935, this Court determined that when a prosecutor procures a criminal conviction through the use of perjured testimony, known to be perjured and knowingly used to obtain a conviction, due process is violated. *Mooney v. Holohan, 294 U.S. 103 (1935).* Twenty-two years later, the doctrine was expanded to include, as due process violations, cases where perjured testimony, while unsolicited by the prosecutor remain uncorrected by him. *Alcorta v. Texas, 355 U.S. 28 (1957).* Finally, in 1959, the Supreme Court again modified that position to include false testimony which related solely to the character of the witness as a due process violation. Writing for a unanimous Court, Chief Justice Warren focused on the effect of false character testimony:

"The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."

Napue v. Illinois, 360 U.S. at 269.

There is a direct correlation between the factual situation in *Napue* and in the instant case. In each, the Government's principal witness was a person alleged to have been intimately involved in the same action as that for which the defendant was charged. In each case, that witness had been the beneficiary of some type of consideration for his testimony. Unlike *Napue*, however, LUCIEN FELDON fabricated the entire story of his background, and the story of how he got involved with the D.E.A. Both he and Director WILLIAM PLASE repeatedly gave inconsistent stories concerning the nature of LUCIEN FELDON's prior police experience and contact with the D.E.A. Finally, Director PLASE admitted, at the hearing on Petitioner's Motion for New Trial, that he had *"no knowledge of Mr. Feldon's background"*—this, despite his prior testimony at trial that he had met FELDON in 1966 in a manner which suggested a continuing relationship between PLASE and FELDON, and that FELDON was, in fact, an agent for a different agency of the Government at the time.

Once the trial court had denied MILTON WEISS' Motion for Production of Favorable Evidence concerning LUCIEN FELDON, the defense was left with the impossible task of proving a negative; that is, that LUCIEN FELDON had never been what he said he was; that FELDON had never worked for the United States Government in any secret and highly-sensitive capacities.

After denying the Petitioner this information, the prosecution, assisted by Director WILLIAM PLASE, presented LUCIEN FELDON's perjured testimony, secure in the knowledge that they alone possessed the information to disprove it. No matter how much one

would like to believe that the prosecutors in this case were not actively attempting to cover up for LUCIEN FELDON, it became apparent at trial that they would use any means possible to salvage their case. Even after D.E.A. Group Supervisor SIMPSON testified that he was the agent who arrested LUCIEN FELDON in 1974 and that FELDON's story about working undercover was a complete fabrication, the Government rehabilitated FELDON's story by attempting to make Agent SIMPSON say that it could have been possible that FELDON was so deeply undercover that even SIMPSON didn't know about it.

It would be a lengthly and tedious task to summarize the numerous occasions upon which LUCIEN FELDON testified falsely; he lied about his arrest for distribution of cocaine, he lied about his work experience; he lied about how he got involved with the D.E.A. FELDON lied, and the Government and Case Agent WILLIAM PLASE knew he was lying, and covered for him. These lies were the "subtle factors" upon which the Petitioner's life and liberty depended. The heroic picture of LUCIEN FELDON painted by the Government and PLASE molded the jury's opinion of FELDON's veracity and reliability.

Because this false testimony was so material to the Petitioner's case, and because the testimony was known to the prosecuting authorities to be perjured and misleading, the decision of the appellate court denying the Petitioner a new trial based on the use of false testimony to obtain a conviction flies in the face of this Court's decision in *Mooney*, *Alcorta*, and *Napue*.

CONCLUSION

The Petitioner respectfully submits that the Government's non-disclosure of relevant evidence, and its promulgation of tainted evidence that it knew to be false and misleading, have had the same effect on the Petitioner in denying him a fundamentally fair trial and due process of law.

Based on the foregoing facts, arguments, and authorities, the Petitioner respectfully urges this Honorable Court to issue its Writ of Certiorari to the United States Court of Appeal for the Third Circuit, and to take jurisdiction of this cause.

Respectfully submitted,

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(305) 371-6421

By _____
ROY E. BLACK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for a Writ of Certiorari in this cause were served, by United States Mail, upon the HON. REX E. LEE, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, this ____ day of July, 1983.

BLACK AND FURCI, P.A.
Attorneys for Petitioner
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(305) 371-6421

By _____
ROY E. BLACK

APPENDIX A

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

CRIMINAL NO. 82-96

21 U.S.C. Sections 841(a)(1) and 846

DISTRIBUTION OF CONTROLLED
SUBSTANCE AND CONSPIRACY

UNITED STATES OF AMERICA

Plaintiff,

vs.

MILTON WEISS, STEPHEN J. SESSA, ERICA SMITH,

Defendants.

CRIMINAL NO. 82-97

19 V.I.C. Sections 604(a), 609
19 V.I.C. Section 614(a)(3)(B)
19 V.I.C. Section 11

DISTRIBUTION OF CONTROLLED
SUBSTANCE, CONSPIRACY
TRAFFICKING IN COCAINE

GOVERNMENT OF THE VIRGIN ISLANDS

Plaintiff,

vs.

MILTON WEISS, STEPHEN J. SESSA, ERICA SMITH,

Defendants.

ORDER

THIS MATTER is before the Court on various motions by Defendant Weiss. The premises considered, now therefore it is

ORDERED:

1. THAT the motion to suppress the contents of a safe deposit box will be heard following jury selection on September 13, 1982.

2. THAT the motion for a pre-trial evidentiary hearing to determine the existence of a conspiracy be and the same is hereby DENIED.

3. THAT the motion to inspect sealed court records be and the same is hereby DENIED as moot, the records having been unsealed as of August 13, 1982.

4. THAT the motion for pretrial disclosure of Rule 404(b) evidence and any "bad acts" on the part of the government witnesses be and the same is hereby DENIED.

5. THAT the motion for a bill of particulars be and the same is DENIED as to 2(f), (g) and (i) and GRANTED in all other respects.

6. THAT the motion for a witness list be and the same is hereby DENIED.

7. THAT the motion for disclosure of materials relating to Lucien Feldon be and the same is hereby DENIED.

DATED this 30th day of August, 1982.

ENTER:

/s/ David V. O'Brien
DAVID V. O'BRIEN, Judge

ATTEST:
GEOFFREY BARNARD
Clerk of the Court

By /s/ Alice A. Maynard
Deputy Clerk

APPENDIX B

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

CRIMINAL NO. 82-96

21 U.S.C. §§841(a)(1) & 846

DISTRIBUTION OF CONTROLLED
SUBSTANCE and CONSPIRACY

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MILTON WEISS, STEPHEN J. SESSA, ERICA SMITH

Defendants.

ORDER

THIS MATTER is before the Court on motions by Defendants Weiss and Smith for judgment of acquittal, or, in the alternative for a new trial. The Court having filed its Memorandum Opinion of even date herewith, now therefore it is

ORDERED:

THAT, Defendants' motions be and the same are hereby DENIED.

DATED this 21st day of October, 1982.

ENTER:

/s/ David V. O'Brien
DAVID V. O'BRIEN, Judge

ATTEST:
GEOFFREY BARNARD
Clerk of the Court

By /s/ Frank Blackman
Deputy Clerk

APPENDIX C

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS & ST. JOHN

CRIMINAL NO. 82-96

21 U.S.C. §§841(a)(1), and 846

DISTRIBUTION OF CONTROLLED
SUBSTANCE and CONSPIRACY

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MILTON WEISS,

Defendant.

CRIMINAL NO. 82-97

19 V.I.C. §§604(a), (609)
19 V.I.C. §614(a)(3)(B)
14 V.I.C. §11

DISTRIBUTION OF CONTROLLED
SUBSTANCE, CONSPIRACY
TRAFFICKING IN COCAINE

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MILTON WEISS,

Defendant.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that MILTON WEISS, the Defendant above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the Final Judgment of Conviction and Sentence entered in this action on the 20th day of October, 1982.

DATED this 20th day of October, 1982.

Respectfully submitted,

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ROY E. BLACK,
Attorney for Defendant

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 82-3527

UNITED STATES OF AMERICA

v.

MILTON WEISS,

Appellant

(D. C. Criminal No. 82-90-01)

JUDGMENT ORDER

Milton Weiss appeals from a judgment of sentence following his conviction of conspiracy to distribute and distribution of cocaine. He contends:

1. that the conviction should be set aside because the government made knowing use of perjured testimony;

2. that the court erred in denying the motion for production of evidence favorable to the defense;

3. that the court's charge on multiple conspiracies was inadequate;

4. that the severence motions should have been granted;

5. that the prosecutor's closing argument was unduly prejudicial;

6. that the jury was prejudiced by a recess for Rosh Hashana and the resumption of testimony on Sunday.

We find no merit in these contentions.

It is ORDERED and ADJUDGED that the judgment of the district court is affirmed.

BY THE COURT,

/s/ John J. Gibbons
Circuit Judge

Attest:

/s/ Sally Mrvos
Sally Mrvos, Clerk

DATED: May 4, 1983

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 82-3527

UNITED STATES OF AMERICA

v.

MILTON WEISS,

Appellant

(D. C. Criminal No. 82-90-01)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ADAMS, GIBBONS, HUNTER, WEIS, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ John J. Gibbons
Judge

Dated: June 7, 1983

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 82-3527

UNITED STATES OF AMERICA

vs.

WEISS, MILTON,

Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until July 14, 1983.

/s/ John J. Gibbons
Circuit Judge

Dated: June 23, 1983

No. 83-201

In the Supreme Court of the United States

OCTOBER TERM, 1983

MILTON WEISS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

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QUESTIONS PRESENTED

1. Whether the district court committed reversible error by denying petitioner's request that the government produce records supporting the main prosecution witness's testimony that he had worked for various government intelligence agencies in the past.

2. Whether the government knowingly used perjured testimony on any material issue to obtain petitioner's conviction.

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In the Supreme Court of the United States

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MILTON WEISS, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A9-A10) is reported at 714 F.2d 126.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1983. A petition for rehearing was denied on June 7, 1983 (Pet. App. A11-A12). The petition for a writ of certiorari was filed on August 5, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of the Virgin Islands, petitioner was convicted on one count of conspiracy to distribute cocaine and one count of distributing cocaine, in violation of 21 U.S.C. 846 and 841(a)(1), respectively. He was sentenced to concurrent

terms of imprisonment for ten years and received a three-year special parole term. The court of appeals affirmed (Pet. App. A9-A10).

1. The government's evidence showed that on May 18, 1981, Lucien Feldon came to St. Thomas in the Virgin Islands, at the request of narcotics agent Wilbur Plase, for the purpose of helping the Islands' Narcotics Strike Force as an undercover agent (Tr. 182-183). Thereafter, he met petitioner's co-defendants, Erica Smith and Stephen Sessa, and made several purchases of cocaine, primarily from Sessa (Tr. 102, 111-121, 130-139). After developing this relationship, Feldon made efforts to learn from Sessa who his source was and asked to meet with the source directly in order to purchase larger quantities of cocaine (Tr. 162-164).

On the afternoon of September 9, 1981, Sessa, who was the manager of a store known as the Fruit Bowl, told Feldon that he expected to meet his drug supplier after work (Tr. 147-148). Sessa disclosed that his source would be coming to St. Thomas by ferry and that they would be meeting somewhere on the east end of the island (Tr. 414-415). Feldon notified law enforcement officers, who then arranged to surveil Sessa. Officer Wilfred Berry saw Sessa leave work at 5:25 p.m., drive to a house on the east end of the island and park his car behind a truck identified as belonging to petitioner. When Berry terminated his surveillance an hour later, the vehicles were still parked. At 9:00 p.m., Sessa invited Feldon to his residence and showed Feldon a small quantity of cocaine. Sessa told him that it had come from the same source as a previous purchase that Feldon had made (Tr. 147, 149, 259-260, 415-416).

On September 14, Feldon telephoned Sessa at the Fruit Bowl and asked whether he could purchase two or three ounces of cocaine. Sessa indicated that he thought so, but that he would have to let him know later (Tr. 150). That evening Sessa notified Feldon that the transaction would

have to be delayed one day. The next morning Feldon telephoned Sessa, who said that he had not yet heard from "his man" (Tr. 154). At 2 p.m., Sessa told Feldon by telephone that his source had just called to say that he was on his way (Tr. 154-155). Between 2 and 3 p.m., petitioner was observed arriving at the Fruit Bowl and departing after a brief stay (Tr. 203). At 3:10 p.m., Feldon entered the Fruit Bowl and purchased cocaine from Sessa (Tr. 155-156).

Eventually Sessa divulged to Feldon that petitioner was Sessa's cocaine source (Tr. 422). In late April 1982, Sessa arranged for Feldon to meet petitioner at Sessa's residence. After they were introduced, Feldon asked, "What do you want to do?" Feldon and petitioner then discussed a possible purchase of cocaine. As it turned out, the sale fell through because petitioner was suspicious of Feldon (Tr. 169-173).

2. At trial, Feldon testified about his background. He stated that he and officer Plase had worked for different agencies in Chile in 1966 and that he also had worked for Plase in Aspen, Colorado (Tr. 103-104). During Feldon's cross-examination, petitioner's counsel asked Feldon about his arrest in 1974 for the sale of cocaine to DEA agent William Simpson (Tr. 352-354).[1] The Assistant United States Attorney objected to petitioner's counsel's inquiry into Feldon's arrest in 1974 as not a proper basis for impeachment and as being collateral to petitioner's defense. The district court acknowledged its collateral nature, but

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[1]On cross-examination Plase denied that when Feldon had agreed to assist him in Colorado from 1978 to 1980, the latter was cooperating as a result of being arrested in New York in 1974 (Tr. 200-201). Plase stated that after recruiting Feldon, he learned that Feldon had been arrested in New York in 1974, but that all charges had been dropped in 1976 (Tr. 204-210).

agreed to permit the examination in order to allow petitioner to probe Feldon's motivation for testifying in this case.

On re-direct examination Feldon was asked by the Assistant United States Attorney to explain the circumstances surrounding the arrest in 1974. Feldon stated that he had been assisting the Defense Intelligence Agency at the time and that the cocaine transfer was part of his undercover work (Tr. 453-458). Petitioner's counsel summoned agent Simpson, the officer who arrested Feldon in 1974, to testify. Simpson said that he was unaware that Feldon's drug activity in 1974 was related to any undercover intelligence work. According to Simpson, Feldon began cooperating with the DEA after his arrest, and as a result of his "outstanding job" the charges were dismissed (Tr. 850-858). The Assistant United States Attorney asked Simpson whether it was possible that Feldon was acting as an undercover agent when he sold cocaine in 1974 and Simpson admitted that it was possible (Tr. 855).

3. Following petitioner's conviction, he filed a motion for a new trial alleging that the government had knowingly used false testimony and had concealed evidence useful to impeach Feldon. The perjury claim was premised upon purported differences in Feldon's background as testified to by Feldon in petitioner's trial compared with his testimony in other trials. The suppression of evidence contention was founded on the rejection *by the court* of petitioner's counsel's request that the government furnish particulars regarding Feldon's history of service on behalf of various government agencies (Pet. App. A3).

At a hearing on the motion, the Assistant United States Attorney informed the court that he had no knowledge of false testimony given by any government witness and that petitioner's counsel had had access to the entire government

file except for a few unrelated items (H. 31).[2] The lone witness called by petitioner at the hearing, Officer Plase, testified that he first met Feldon in the mid-1960's at a social function in Chile and that an embassy official who did work for the Central Intelligence Agency had introduced Feldon to Plase. Plase further testified that he employed Feldon in Colorado in 1978 after checking with DEA agents in New York, who praised Feldon's undercover work there and that, although Feldon might have mentioned having worked for other agencies, Plase did not attempt to verify that information. Finally, he said that Feldon never told him that the 1974 arrest was a sham (H. 20-25). After this testimony petitioner renewed his demand for production of all information concerning Feldon's status with any government agency for the past 26 years. The district court denied the motion (H. 49).

The court of appeals affirmed petitioner's conviction by judgment order (Pet. App. A9-A10).

ARGUMENT

Petitioner argues (Pet. 13-19) that the government knowingly permitted Feldon to perjure himself regarding his background as a government agent and his 1974 arrest and that the prosecution was able to conceal the perjury by refusing to disclose all information in the government's files regarding Feldon's activities as an undercover informant or agent for various intelligence agencies. Petitioner's claims are without merit.

Even accepting as true petitioner's assertion that Feldon testified falsely regarding his 1974 arrest, it is plain that petitioner could not possibly have been prejudiced by the alleged discrepancies. Compare *Giglio* v. *United States*,

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[2] "H." refers to the transcript of the hearing on petitioner's motion for a new trial.

405 U.S. 150, 154 (1972); *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959). The sole purpose of the inquiry was to determine whether Feldon had any motive for testifying falsely about the cocaine conspiracy and petitioner's involvement in it; the arrest could not properly be used directly to impeach Feldon. See Fed. R. Evid. 609. Since the narcotics charge was dismissed in 1976, long before Feldon ever went to the Virgin Islands, it is clear that nothing regarding that incident colors Feldon's reasons for testifying in this case. Accordingly, the 1974 arrest was completely irrelevant and petitioner never should have been allowed to inquire into it in the first place. Nevertheless, petitioner was allowed to impeach Feldon by cross-examining him about that incident. Since petitioner was granted a wholly unwarranted basis for impeaching Feldon's testimony, he can hardly complain that he was prejudiced by not being allowed to inquire further into the matter.

Nor is there any basis for petitioner's claim that the prosecutors knowingly elicited perjured testimony. The government agent told the court that he had not inquired into Feldon's 1974 arrest because his only concern was how good Feldon was as an undercover agent. In that regard, Feldon had an undeniably excellent reputation. Since Feldon's activities in the Virgin Islands were clearly part of a formal undercover arrangement with the government and were not undertaken because of any pending charges, the prosecutors in this case had no reason to inquire into an eight-year-old arrest. They simply accepted Feldon's version and cross-examined Simpson in order to determine whether he could unequivocally dispute Feldon's story, which he could not.[3] In the context of this clearly collateral

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[3]Petitioner argues (Pet. 13) that the prosecutor misled the jury by stating that Feldon had been involved in police activities and undercover intelligence work for 26 years. But that statement appears to be

matter, there is no reason to impute bad motive to the prosecutor's effort to probe the extent of Simpson's knowledge about Feldon's activities in 1974.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

MERVYN HAMBURG
Attorney

SEPTEMBER 1983

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true. Feldon and Plase both discussed Feldon's undercover work in Chile dating back to the 1960's.

Nor did the government's objection to petitioner's pre-trial demand for all government files relating to Feldon raise any issue under *Brady* v. *Maryland*, 373 U.S. 83 (1963). Even assuming there was a reasonable likelihood that some relevant information might be contained in these files, the district court could properly refuse to require the government to undertake such a burdensome task on such a minor matter. In any event, it is plain that information regarding precisely how many years Feldon had worked for various agencies, which is the only factual matter petitioner has contested (Pet. 14-15), could not possibly have affected the jury's verdict in this case. See *United States* v. *Agurs*, 427 U.S. 97, 112-113 (1976).